United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

Docket No. 74-1527

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

B

Pgs 6

FRANCIS C. PLANO,

Appellant,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Appellees.

REPLY BRIEF OF APPELLANT FRANCIS C. PLANO

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Appellees.

REPY BRIEF OF APPELLANT FRANCIS C. PLANO

STATEMENT

This reply brief is submitted by appellant Plano in response to matters raised in briefs of appellees.

POINT I

APPELLANT PLANO'S SUIT ALLEGES THAT APPELLEES HAVE DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS, AND HE RAISES HIS ACTION IN THE FEDERAL COURTS.

Attorney for appellee board members in their official capacity cites the necessity of appellant giving notice of his suit pursuant to General Municipal Law §§50-e and 50-i as well as Education Law §3813. These sections are inapplicable to the case at bar. Sections 50-e and 50-i refer to tort claims for personal injury or property damage; section 3813 refers to claims against school boards of a purely monetary nature. All would be inapplicable to the instant case if it were brought in a New York State court. Since appellant Plano raises the instant case in the Federal court, alleging deprivation of various constitutional rights, he is not required to give notice of his claim to the appellees under any section of New York law because the federal law is supreme. It must also be noted that appellant Plano is suing under Federal law, not to challenge various sections of the New York Education Law, but for restitution of his employment and compensation for the denial of his constitutional rights.

POINT II

APPELLANT PLANO HAS HAD NO OPPORTUNITY TO DEVELOP AND PRESENT THE EVIDENCE HE DESIRES.

Appellees' briefs seek to have this Court believe that appellant Plano could have presented all the evidence and established any kind of record he deemed necessary to develop the factual context of his case. This is completely incorrect. In point of fact, in order to more fully develop the evidentiary aspects of the case at bar, appellant must be able to speak to appellees, take depositions from them, obtain necessary documents, and be permitted to cross-examine adverse witnesses. It is obvious that due to procedural deficiencies in an appeal before the Commissioner of Education, as detailed in appellant's brief in chief, this is not possible. Indeed, the Commissioner of Education will not hear testimony, nor keep a record of the proceedings before him. If this is so, appellant is denied one of the most important sources of information to prove his allegations, namely that information which could be garnered from the appellees themselves.

It is clear that findings of fact made in the crucible of a court of law, with appropriate opportunity for cross-examination and presentation of adverse witnesses, is crucial in a matter where questions of fact are so totally disputed. The District Court in its decision, made numerous references to the need for resolving the critical issues of law and

fact herein presented. A proceeding before the Commissioner of Education is based totally on affidavits and papers which cannot be cross-examined or otherwise tested. Witnesses cannot be evaluated as to their truthfulness. Evidence cannot be developed. There is little reason for pursuing this avenue of review.

At page 12 (corrected) of his brief, attorney for appellee board members in their official capacity cites Hayes v. Cape Henlopen School District, 341 F. Supp. 823 (D. Md., 1972), for a definition of the adequacy of administrative remedies. Rather than precluding appellant Plano's right to federal judicial relief, it encourages it. The court stated at page 831:

> "Thus absent a clear showing that the state administrative procedures afford a realistic alternative for an aggrieved litigant, the exhaustion doctrine should not be implemented. The right to hear and refute evidence presented against oneself, the right to present evidence on one's behalf, the right to call witnesses on one's behalf and the right to an impartial tribunal would most likely be components of an administrative procedure sufficiently adequate to require exhaustion prior to commencing a suit under Section 1983 to vindicate the interference with a constitutional right. To demand less is to vitiate the Supreme Court's repeated declaration that Section 1983 creates a separate and supplementary remedy for deprivation of constitutional rights." [Emphasis supplied.]

To proceed with an appeal to the Commissioner of Education, appellant Plano is doomed by the rules of the Commissioner to fight with "one hand tied behind his back." For a proper presentation of the issues herein presented,

appellant must be able to illuminate the murky depths of an in camera decision-making process. Appellant Plano not only questions the result of appellees' actions, his termination of employment, but he also questions basic administrative motivations and actions. To deny appellant the opportunity to present witnesses and to take testimony, is to foreclose review of administrative activity. An appeal to the Commissioner is an incomplete remedy, for appellant is foreclosed from presenting his case.

Finally appellant Plano seeks damages against appellees in all capacities. This is a remedy which the Commissioner of Education does not grant. Therefore exhaustion is inappropriate, since the relief requested by appellant cannot be granted by the administrative forum. See Preiser v. Rodriguez, 411 U.S. 475 (1973) at pages 493-494.

Although attorneys for appellees proceed to paint a laudatory picture of the administrative process available to appellant, they fail to realize that an opportunity to be heard and to present witnesses and to take testimony is far more important than the sterile procedure envisioned by the Commissioner of Education. That the appellant presents serious factual questions which need further review and investigation is clear from the decision of Chief Judge Foley in the court below.

Attorney for appellee board members as officials in his brief states:

"It is irrelevant for Appellant to suggest that the Commissioner of Education is an improper or inadequate forum."

Appellant suggests, rather, that it is of the essence to consider whether the Commissioner of Education is a proper or improper forum. Appellant challenges the procedural barriers that the Commissioner of Education has errected to proper review of his case. Furthermore, in spite of attorney for appellees as officials noting that the Commissioner of Education has overruled and reversed decisions of boards of education, the Commissioner's record as to constitutional questions is extremely poor. See for example the decision of the Commissioner of Education in James v. Central School District No. 1, 10 Ed. Dept. Rep. 58 (1970) and compare it to the opinion of this Court in James v. Board of Education, 461 F. 2d. 566 (2d Cir. 1972).

An appeal to the Commissioner prior to recourse to the Federal courts presents additional procedural barriers to due process. One of the standard exceptions to the traditional exhaustion requirement is that a party need not pursue an administrative appeal if, in the meantime, the adverse administrative decision at the lower level is being implemented against him. Exhuastion inevitably means delaying one's access to a judicial remedy. That delay may be acceptable as a matter of policy where an adverse consequence is visited upon the party by reason of the delay. But the interest in providing judicial protection against immediate

injury is normally seen as outweighing the interests inhering in the exhaustion requirement.

This balance is reflected in the Supreme Court's recent decision in Gibson v. Berryhill, 411 U.S. 564 (1973). The Court there recognized that if there was to be any breach whatsoever in the rule against exhaustion in 1983 cases, that breach could be appropriate only "where the individual charged is to be deprived of nothing until the completion of that [administrative] proceeding."

POINT III

TRADITIONALLY CASES UNDER 42 U.S.C. §1983 INVOLVING FIRST AMENDMENT RIGHTS HAVE BEEN DEEMED EXCEPTIONS TO THE EXHAUSTION DOCTRINE.

Traditionally, cases involving alleged deprivations of First Amendment rights have been deemed exceptions to the traditional doctrines delaying access to the Federal courts. This has resulted for two reasons: first, administrative agencies have been considered inappropriate tribunals to resolve First Amendment claims; and second, the delays inherent in pursuing administrative remedies have been seen as having a "chilling effect" upon the exercise of First Amendment rights.

Obviously, the Commissioner of Education has no special expertise in applying the First Amendment. Such matters are uniquely the province of the Federal courts. Consequently, the traditional reasons for deference to administrative agencies are absent. Hayes v. Cape Henlopen School District, supra, at page 833.

> "[T]he issues of freedom of speech and due process ... present questions frequently litigated before federal courts... Thus, ... the ordinary deference to administrative expertise, which is often cited as a reason for the exhaustion requirement, is not necessarily appropriate."1/

Cf. McKart v. United States, 395 U.S. 185, 197-99 (1969) (exhaustion unimportant where "the resolution of [the] issue does not require any particular expertise on the part of the

appeal board; the proper interpretation is certainly not a matter of discretion"; "judicial review would not be significantly aided by an additional administrative decision of this sort"; and "there is simply no overwhelming need for the court to have the agency finally resolve [the] question in the first instance").

Coupled with the absence of the normal benefits to be derived from the exhaustion rule is the serious harm to First Amendment of administrative remedies. As the Second Circuit observed in Wolff v. Selective Service Local Board No. 16, 372 F. 2d at 817, 825 (2d Cir. 1967):

> "Normally it is desirable that the administration function with a minimum of judicial interference but also that, when the administration does err, it be free to work out its own problems. But ... when as here a serious threat to the exercise of First Amendment rights exists, the policy favoring the preservation of these rights must prevail."

1/ The Supreme Court recognized that the proper forum for resolution of First Amendment claims is the Federal court, and for this reason rejected a claim that the assertion of First Amendment violations alone entitled a teacher to an administrative hearing. Board of Regents v. Roth, 408 U.S. 564, 575, n. 14 (1972); Perry v. Sindermann, 408 U.S. 593, 599, n. 5 (1972).

POINT IV

THE CASES CITED BY ATTORNEY FOR APPELLEES AS OFFICIALS ARE IMPROPERLY CITED FOR THE PRINCIPLES OF THIS CASE.

Appellee board members' brief in their official capacity at page 10, cites the case of McGee v. United States, 402 U.S. 479 (1971), for the proposition that appellant is required to exhaust administrative remedies prior to instituting a federal suit. This case is inapplicable, because the McGee case did not concern the Civil Rights Act, but merely review of a criminal conviction. The Supreme Court of the United States has said in numerous cases that actions commenced under the Civil Rights Act do not require exhaustion of administrative remedies; rather, the Civil Rights Act is supplementary to any state remedy. See McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); Carter v. Stanton, 405 U.S. 669 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971).

The Supreme Court has also emphasized the supplementary nature of a remedy under the various Civil Rights Acts in Alexander v. Gardner-Denver Co., ____ U.S. ____, 7 F.E.P. Cases 81, 85 (1974), wherein the Court stated:

> "In addition, legislative enactments in the area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.[7]
>
> * * *
>
> 7. See e.g., 42 U.S.C. §1981 (Civil Rights Act of 1866); 42 U.S.C. §1983 (Civil Rights Act of 1871)."

Attorneys for appellees cite Christian v. New York State Department of Labor, 42 L.W. 4181 (January 21, 1974) to show that the doctrine of exhaustion of administrative remedies is alive and well. This case is inapplicable to the case at bar, since in the Christian case the plaintiffs therein were not suing pursuant to 42 U.S.C. §1983, but rather 28 U.S.C. §1361--an action in the form of mandamus. Before the Court in Christian would order an official of the United States to give plaintiffs a hearing, plaintiffs' claim was remanded with directions to have the record show whether the procedures which were challenged as inadequate had ever been offered to plaintiffs. The case at bar is based on the jurisdiction conferred by 42 U.S.C. §1983 and therefore Christian is inapposite.

Attorney for appellees as individuals (excepting appellee F. Wright Johnson), argues at page 2 of his brief that Preiser v. Rodriguez is evidence that exhaustion of remedies is "alive and well". Appellant Plano submits that Preiser is incorrectly applied. In Preiser the Court ruled that where a specific federal law required exhaustion, in habeas corpus proceedings (28 U.S.C. §2254) it must be followed in lieu of 42 U.S.C. §1983. It is clear that the Congress may amend or modify the laws of our country. However, no specific federal statute exists requiring such exhaustion in cases such as the one at bar.

Gibson v. Berryhill, 411 U.S. 564 (1973), cited by attorney for appellees as individuals (save F. Wright Johnson),

does not resurrect the concept of exhaustion. The quote supplied is incomplete. Quoted in full it states at pages 574-75:

> ". . . But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 USC §1983. McNeese v. Board of Education, 373 US 668 (1967). Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees' lawsuit." [Emphasis added.]

The Court made clear that in recent years it has held state administrative remedies need not be exhausted in cases based on 42 U.S.C. §1983.

Attorneys for appellees argue that a board of education is not a "person" under 42 U.S.C. §1983, citing Monroe v. Pape, 365 U.S. 167 (1961) and Moor v. County of Alameda, 693 (1973). This is incorrect. The above cited cases, and most recently City of Kenosha v. Bruno, 412 U.S. 507 (1973), hold only that municipal corporations may be immune to suit under 42 U.S.C. §1983.

It is clear, however, that it is state law which defines the status of various political or governmental subdivisions. Under New York law, a board of education is not a municipal corporation. New York General Municipal Law §2 states:

> "The term 'municipal corporation', as used in this chapter, includes only a county, town, city and village. The term 'governing board' includes the board of supervisors of a county, the town board of a town, the common council of a city, and the board of trustees of a village."

See also Schnepel v. Board of Education of the City of Rochester, 302 N.Y. 94 (1951), wherein New York's highest court, the Court of Appeals, held a board of education not to be a municipal corporation.

The General Corporation Laws of New York, Section 3.2, states:

> "A 'municipal corporation' includes a county, city, town, village and school district."

This clearly evidences that a board of education is not a municipal corporation. Although the General Municipal Law and the General Corporation Law differ in regard to "school district", they both are in agreement regarding boards of education--both laws exclude them as municipal corporations. See also Berkey v. Downing, 68 Misc. 2d 595, 327 N.Y.S. 2d 921 (1972), aff'd 39 App. Div. 2d 1008, 335 N.Y.S. 2d 249 (3d Dept. 1972).

Although General Municipal Law §2 and General Corporation Law §3.2 seem to differ with regard to "school districts",

the New York Court of Appeals in Board of Education of Union Free School District No. 1 v. Wilson, 303 N.Y. 107 (1951) has held that a school district has no territorial integrity. This makes Monroe v. Pape, supra, Moor v. County of Alameda, supra and City of Kenosha v. Bruno, supra inapposite to New York school districts. Furthermore in Central School District No. 1 v. Stoddard, ____ Misc. ____, 49 N.Y.S. 2d 38, aff'd 268 App. Div. 936, 51 N.Y.S. 2d 269, aff'd 294 N.Y. 667 (1945), the New York Court of Appeals held that General Corporation Law §3.2 which holds school districts to be municipal corporations, must yield to General Municipal Law §2 which excludes them. It must be noted that in, Monroe v. Pape, supra, at pages 171-72, the Court was clear in holding that officials of a governmental subdivision could be sued under 42 U.S.C. §1983. This includes all of appellee board members in their official capacity.

Therefore, appellees as officials may still be considered as "persons" for the purposes of 42 U.S.C. §1983, and boards of education are not immune from suit. It must also be remembered that appellant Plano also claims jurisdiction over all appellees under 28 U.S.C. §1331, alleging a separate monetary jurisdiction. In City of Kenosha, supra the Court noted that jurisdiction to sue the two cities involved may well have been stated under 28 U.S.C. §1331. There is no "persons" requirement under 28 U.S.C. §1331.

POINT V

APPELLEES HAVE ABRIDGED APPELLANT'S FIRST AMENDMENT GUARANTEE OF FREE SPEECH.

It is curious that attorney for appellee board members as officials concludes that appellant's right to free speech has not been abridged. In point of fact, within two days of giving a composition on student attitudes toward pre-maritial sex, appellant was told that he was going to be fired. Attorney for appellees as officials alleges at page 16 of his brief that there is no allegation that appellees adopted a regulation or rule forbidding the discussion or expression of opinions on the subject of pre-maritial sex, either in or out of the classroom. This is the crux of the First Amendment claim. How could appellant Plano know that assigning a composition on pre-maritial sex was taboo if there were, in fact, no such regulations? Appellant Plano's brief-in-chief cites several cases wherein teachers were ordered reinstated because their assignment of subject matter or their expressions of apparently taboo words was never declared to be contrary to the educational policies of the schools in which they worked. It is difficult for one to know what should not be assigned in the classroom if there is no guideline to follow.

At page 17 of the brief of appellee board members in their official capacity, Justice Black is quoted in Epperson v. Arkansas, 393 U.S. 97 (1968), for the proposition that a

state may regulate the curriculum of its schools. Appellant does not here challenge this statement. What appellant does challenge is that he is expected to know the limits of the school's curriculum without ever being apprised of them. This presents serious constitutional problems in due process. See Armstrong v. Manzo, 380 U.S. 545 (1965). It is a firmly established constitutional proposition that in order for someone to be charged with a violation of specific rules and regulations, he must also know that the conduct is proscribed. Justice Black, in fact, in Epperson. supra, wanted to find the Arkansas anti-evolution statute vague for failure to require standards or to limit in any meaningful terms the conduct to be proscribed. Appellees have never stated any standards of conduct to which appellant Plano should be held accountable.

POINT VI

APPELLANT PLANO'S PROPERTY INTEREST IS A PROTECTED RIGHT.

At page 24 of the brief submitted by appellee F. Wright Johnson, it is argued that appellant Plano has no property interest protected by the Fourteenth Amendment. Appellant Plano, in his brief-in-chief argues that he had a property right in an objective expectancy of employment for the term of his probationary appointment and a contract interest in his right to academic freedom. No appellee has even addressed the question of Plano's contractual right to academic freedom as guaranteed him in the collective bargaining agreement under which he works. It is a basic and fundamental rule of contracts that they both create and define property rights and interests! Appellant submits that the presence alone of this contractual right and the allegation of its violation presents a wrong redressable under the Fourteenth Amendment and by a suit under 42 U.S.C. §1983.

CONCLUSION

Appellant Plano submits that appellees have deprived him of his constitutional rights of property, liberty and freedom of speech. Appellant submits further that there is no requirement of "exhaustion" because this case is brought pursuant to 42 U.S.C. §1983, and because the procedural avenues for administrative review are inadequate and incomplete. Last, appellant contends that all appellees are persons, and thus are subject to suit under 42 U.S.C. §1983.

Respectfully submitted,

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Dated: July 15, 1974

STATUTORY APPENDIX

UNITED STATES

United States Code

Title 28

§1331. Cited in brief-in-chief at SA-1.

§1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented

* * * * *

Title 42

§1983. Cited in brief-in-chief at SA-2.

New York

Education Law

§3813. Presentation of claims against the governing body of any school district.

1. No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to district property or claim against the district, or involving its rights or interests shall be prosecuted or maintained against any school district, board of education, or any officer of a school district or board of education, unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

* * * * *

General Corporation Law

§3.2. Definitions

2. A "municipal corporation" includes a county, city, town, village and school district.

General Municipal Law

§2. Definitions

The term "municipal corporation," as used in this chapter, includes only a county, town, city and village. The term "governing board" includes the board of supervisors of a county, the town board of a town, the common council of a city, and the board of trustees of a village.

§50-e. Cited at p. 11, Appendix in brief for appellees as officials.

§50-i. Cited at p. 12, Appendix in brief for F. Wright Johnson.

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Appellees.

Docket No. 74-1527

AFFIDAVIT OF SERVICE BY MAIL.

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

RUBY P. NICHOLSON, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 81 Academy Road, Albany, New York, 12208. That on the 15th day of July, 1974 deponent served the within Reply Brief of Appellant upon Evans, Severn, Bankert & Peet, Attorneys for Appellees (Baker, Melie, Acee, Barns, Nowak, Plehn, Richards, Romeo & Walker), 301 Mayro Building, Utica, New York 13501; Michael P. DeSantis, Attorney for the Appellee Board of Education of the Westmoreland Central School District,

709-10 First National Bank Building, Utica, New York 13501; and John C. Scholl, Attorney for Appellee, F. Wright Johnson, Individually and Officially, 408 Leonard Place, Utica, New York 13502, by depositing same, certified mail, return receipt requested, in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Ruby P. Nicholson

SWORN TO BEFORE me this
15th day of July, 1974.

Notary Public

PATRICIA A. COLITSAS
Notary Public in the State of New York
Residing in Albany County
My Commission Expires March 30, 19 76